No. 12,099

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

George H. Graham,

Appellant,

vs.

The Atchison, Topeka & Santa Fe Railroad (a corporation),

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Summary.

Appellant executed a release in writing covering all claims, known or unknown, against the appellee. He relied upon no representations in making it. He never rescinded this release; in fact, he did not have the money at his command to restore the consideration. There was no attempt to rescind as shown by the evidence, since the instrument by which a rescission might have been attempted was never offered in evidence. The consideration of the release, $1,050.00, was retained by appellant; it is conceded that this would not have been fatal had fraud been proved, but it was not. No actionable fraud is shown by the record. Under the facts the appellant was not entitled to rescind

in any event. There was no concealment of the facts as to the injuries; they were fully known to the appellant. The settlement covered by the release was fair; the consideration was not at all out of proportion to the injuries. The court followed the law in granting a directed verdict.

I.

No Rescission of the Release Was Effected.

On the 1st day of October, 1945, appellant signed a release, which release is in words and figures as follows [T. R. 179]:

> "For the sole and only consideration of $1,050, the receipt of which is hereby acknowledged, I hereby release and forever discharge the Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, its agents and employees from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman; also for loss or damage to personal property. In making this settlement, I am not relying upon any statement made by any agent or official of said Company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom. It is definitely understood that in making this settlement, no promise or representation has been made relative to future employment.
>
> "I have read the above release and understand the same. In Witness Whereof, I hereunto set my hand and seal this first day of October, 1945.
>
> "G. H. Graham. Then follows the word 'Seal' and the word 'Witnesses', then the names 'Rosalie Dondero' and 'F. H. Hitchcock.'"

The appellant received appellee's check for $1,050.00, cashed it, and used the money. There is no record in the case that he either offered to rescind or was able to offer to rescind at any time. [T. R. 183.] The record in regard to this is as follows:

> "The Court: Well, what the attorney wants to know is, you never actually tendered the $1,050 in money to anybody in the Santa Fe?
>
> The Witness: Oh, I may have tendered it, Judge.
>
> The Court: Beg pardon?
>
> The Witness: I have had that much money, yes.
>
> The Court: No, no, the lawyer wants to know whether you actually went to anybody in the Santa Fe and offered them $1,050 in money at any time.
>
> The Witness: I made that request of my attorney.
>
> The Court: Well, now I think you understand what I am talking about; we know you wrote a [T. R. 184] letter, but what the attorney wants to know is, did you take $1,050 in money down to the Santa Fe and say, 'Here, I offer it to you, I want to have this release changed.'?
>
> The Witness: I understand you now. No, I didn't.
>
> Mr. Baraty: Q. You didn't do that, and you didn't tell your lawyers to deliver $1,050 to the Santa Fe Railroad? A. How's that?
>
> Q. You didn't tell your lawyers to deliver $1.050 to the Santa Fe Railroad, did you? A. Well, I don't remember just what I did tell them, but something along that line, that I was ready to give the payment back or—
>
> Q. Did you tell your lawyers to deliver $1,050 to the Santa Fe Railroad? A. I don't remember.

Q. You don't remember. What is the best memory you have on it? Yes or no. A. I am hazy on lots of things. I just don't know. * * *"

[T. R. 241] redirect examination of Mr. Graham by Mr. Emmons:

"Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad? A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man? A. Yes—well, yes.

Q. What was the agreement? A. In the event I couldn't get it all together, they would help me out on it."

What Offer to Rescind Was Made?

Plaintiff's Exhibit No. 5 [T. R. 261-262] reads as follows:

"November 25, 1947.

Messrs. Sievert and Ewing,
Attorneys at Law
121 East 6th Street,
Los Angeles, California

Re: Graham vs. Santa Fe Railroad.

Gentlemen:

Enclosed please find file-marked copy of Substitution of Attorneys in the captioned case, wherein this office replaces Emmett R. Burns, Esq., as attorney of record.

Also enclosed, please find a Notice of Rescission of Release and Offer to Restore Consideration executed by Mr. Graham. Kindly advise us of your wishes in this respect.

Very truly yours,

PHILANDER BROOKS BEADLE,
By ...."

For some reason counsel for appellant omitted offering in evidence any Notice of Rescission of Release and Offer to Restore Consideration. There is, therefore, before the Court no evidence of any rescission, or offer to rescind or to restore the consideration.

Appellant's counsel in their brief at page 7, said:

> "On November 25, 1947, plaintiff's counsel, on behalf of plaintiff, wrote to defendant's attorneys in Los Angeles, California, enclosing a notice of rescission of release and offer to restore consideration executed by plaintiff [Pltf. Ex. No. 5] (262). Defendant's counsel stipulated that the notice and offer to restore were received by defendant's attorneys (261)."

This is not true. We will quote from the record [T. R. 261]:

> "Mr. Emmons: Now, will counsel stipulate that on November 25, of 1946, our office sent a letter to Messrs. Sievert and Ewing, attorneys for the Santa Fe Railroad in Los Angeles?

Mr. Baraty: Let's see the letter. Maybe we can tell (examining). Yes, we will stipulate that that was sent and that we received it.

Mr. Emmons: And I would like to offer in evidence, a letter dated November 25, 1947, directed to Messrs. Sievert and Ewing, Attorneys at Law, 121 East 6th Street, Los Angeles, and may it be admitted in evidence, your Honor?

The Court: All right.

The Clerk: Plaintiff's No. 5.

(Letter dated 11/25/47 referred to above was received in evidence as Plaintiff's Exhibit No. 5.)

Mr. Baraty: We received that letter in our office in San Francisco. We admit the receipt of it.

Mr. Emmons: I would like to read this to the jury (reading)."

Counsel then read to the jury Plaintiff's Exhibit No. 5. The Court will observe that there is nothing in the stipulation and nothing in Plaintiff's Exhibit No. 5 that tells us the contents of any enclosure that may or may not have been in the letter of November 25, 1946. This Court has no knowledge, therefore, of any offer to rescind or to restore the consideration.

The fact, if it be a fact, that the appellant on November 25, 1946, directed to the appellee a rescission of the release of October 1, 1945, and an offer to return the consideration cannot be considered on appeal where such instrument does not appear in the evidence.

Winstanley v. Ackerman, 110 Cal. App. 641.

II.

Rescission, Even if One Were Made, Would Not Have Been Timely.

Even if a rescission had been attempted at this time, it would have been too late. The contract for release was entered into October 1, 1945. Appellant had full knowledge of his physical condition from Dr. Fenlon on February 13, 1946, as he testifies [T. R. 59], yet there is no suggestion of any rescission until November 25, 1947, a year and nine months thereafter, and no reason whatever is given for the delay.

The retention of the consideration by one *sui juris* with knowledge of the facts, will amount to a ratification of a release executed by him in the settlement of a claim, where the retention is for an unreasonable time under the circumstances of the case.

45 *Am. Jur.* page 690, Section 25;

Komer v. Shipley (Circuit Court of Appeals—Fifth Circuit), 154 F. 2d 861.

III.

Release Was Not Result of Mutual Mistake.

There is no factual evidence of mutual mistake regarding the nature or extent of appellant's injuries which resulted from the accident of July 6, 1945. The degenerative disc which appeared in the X-rays taken at the Santa Fe Coast Lines Hospital August 6, 1945, was not the result of the accident of July 6, 1945, according to the evidence of both plaintiff and defendant in the Transcript of Record and the argument in the Brief for Appellant [T. R. 157]:

Testimony of Dr. F. G. Niemand:

"Q. But you are not able to say when the trauma existed or when it was created? A. No, I couldn't do that. I mean, putting a date on it, like the X-rays have a date. I could say relatively.

Q. Could it have happened ten years before this accident? A. No, I don't think that long.

Q. Five years? A. More likely.

Q. More likely five years? A. Maybe five, I don't know. It is hard to say. It is very difficult to say, because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until X-rays are taken."

[T. R. 170] testimony of F. G. Niemand:

"Q. To the best of your opinion, the condition depicted by these X-rays, the three that you put on the box and that were offered by counsel for Mr. Graham, could have existed prior to July 6, 1945? A. Uh-huh (affirmative)."

[T. R. 159] testimony of F. G. Niemand:

"Q. In your opinion, how long prior to the taking of this X-ray film has that calcification existed? A. It depends; that can't be ascertained, because it depends upon the—nature puts out this material as quickly as it needs it, and that can come very rapidly with a severe injury, and with a man that has the weight this man has, this could make itself appear in relatively quick time.

Q. I was going to say rapidly is a relative term? A. That's right.

Q. Now just what do you desire for us to understand by your use of the word 'rapidly' in connection with the question I have just put? A. I would say within a few years.

Q. A few years. So that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years duration? A. Uh-huh, as far as I could ascertain.

Q. And when you say that, you are mindful of the fact, are you, that the injury claimed to have occurred here is alleged to have happened on the 6th of July, 1945? A. Counsel, the things that you have to realize are that symptoms and pathology are not concommitant. By that I mean that you may have a considerable pathology and very few symptoms and very little pathology, and a great deal of symptoms. In other words, this man could have had such a disability giving him very little trouble until an acute blow (indicating) which flares it up in a marked degree."

(Brief for Appellant p. 9):

> "The evidence shows that prior to the accident plaintiff * * * without knowledge thereof, had a degenerative disc between the 5th lumbar vertebra and the sacrum of his spine which, however, caused him no discomfort or disability."

Therefore, there was no mutual mistake in believing that there was no injury to the spine as a result of the accident, in the form of a degenerative disc. It would have, on the contrary, been a mutual mistake if they had thought that the accident did result in a degenerative disc.

It was impossible for appellant to have been mistaken as to the extent of the flare up of the symptoms accompanying his degenerative disc of long standing, since he himself was the best judge of the severity of his own pain and limitation of motion, if any.

IV.

Release Was Not Result of Fraud or Undue Influence.

Counsel for appellant in their argument claim that in a case of fraud a return of the consideration is unnecessary. We have here, however, no evidence of fraud on the part of the appellee. Appellant claims that Dr. Morrison [T. R. 47] "told me to go back to work if I possibly could, that the company was very short of men and that they needed to keep the trains operating—the war was still on, and to go back and take it easy, that I would be all right in thirty or sixty days." Appellant further quoted Dr. Morrison as saying [T. R. 48]: "Go back and take it easy, you will be all right, you can get along."

The remarks attributed to Dr. Morrison by the appellant were in no manner calculated to deceive. His words, if correctly quoted, did not amount to any representation upon which appellant was entitled to rely. It was not evidence of fraud.

There could be no question of undue influence used on appellant to induce him to settle by refusing to let him work until he signed a release. Although Mr. Graham pleads ignorance of the abrogation of Rule 304 which formerly required settlement before returning to work [T. R. 70], nowhere in the evidence does he even state that he believed that it was actually necessary for him to settle before returning to work. The evidence shows that he knew that he could return to work before obtaining a release, first, in that he actually made a run for which he was paid on Sep-

tember 30, 1945 [T. R. 128] before he came to Los Angeles and signed the October 1, 1945, release; and second, in that he had a lawsuit still pending in the Los Angeles Superior Court against the Santa Fe for an injury to his hand reecived in 1943, which he had never settled prior to returning to work in 1943, and for which he had signed no release. [T. R. 68, 69.]

V.
The Appellant Was Not Entitled to Rescind in Any Event.

The clear intention of the appellant was to release all claims, known or unknown, growing out of the accident. By its express terms the release discharged the appellee "from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop, as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman."

He further stated:

> "I am not relying upon any statement made by any agent or official of said company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom."

Appellant's unmistakable intention was to release the appellee from all claims, known or unknown, growing out of the accident. In *Berry v. Struble,* 20 Cal. App. 2d 299, our District Court of Appeal said, at page 301:

> "Plaintiff contends that Section 1542 of the Civil Code applies to the facts, and that therefore the release did not extend to the physical conditions which

subsequently appeared and of which she was ignorant at the time of its execution."

And further said, at page 303:

> "While there is evidence in the record which, as the defendant claims, tends to show that plaintiff was not suffering from an unknown injury when the release was executed, we prefer to place our decision on the ground that the clear intention of the parties was to compromise and release all claims, known or unknown, growing out of the accident; and this being true, no ground for rescission was shown."

In *Pacific Greyhound Lines v. Zane, et al.*, 160 F. 2d 731, this court cited the *Berry* case and said, at page 736:

> "In the absence of *actual fraud*, the express waiver of all rights under this section (Sec. 1542 of California Civil Code) was valid."

Since it has already been observed that the release was not the result of fraud, its terms are binding and conclusive.

VI.

Injuries From Accident Were Fully Known to Appellant.

The uncontroverted evidence is that the condition of the degenerative disc was not brought about by the accident of July 6, 1945. [T. R. 157, 159, 170, 236.] The only result of the accident as shown by the evidence, beyond the usual bruises and contusions about which plaintiff was informed by several doctors, was a possible flare up to some degree of the symptoms of the degenerative disc. The degree of the flare up or exacerbation was indicated by the pain accompanying his movements and the resulting limita-

tion of movements. The plaintiff could not help but be aware of the severity of his pain and impairment of his own movements. Therefore, such a flare up could not be unknown to him at the time he executed the release on October 1, 1945.

Appellant in his Brief, at page 9, states that as a result of the accident the disc was crushed and rendered into a permanently disabling condition. The actual process of how a disc is degenerated was described by Dr. Niemand in the evidence [T. R. 155]:

> "Well, it is the idea that one vertebra is on top of the other, and when the fluid which holds the two apart is gone, then the bone against bone [indicating] crushes the cartilage, which is sort of soft tissue, by the contact, the constant movement of the back, which goes through various motivations. It keeps on crushing, crushing, crushing, until it just degenerates. It breaks up, it smashes, it disintegrates that particular disc."

Since this is usually a process covering years [T. R. 157, 226], there must be factual evidence to show that it occurred suddenly as the result of one accident. There is no such evidence. On the contrary, the evidence contains a description of plaintiff driving his car [T. R. 110, 121], insisting on leaving the hospital at Los Angeles [T. R. 123], and working for about forty-five days after the accident until his discharge for violation of Rule G. [T. R. 62.] This evidence indicates that he was not disabled following the accident.

VII.

The Settlement Covered by the Release of October 1, 1945, Was Fair and Equitable.

In speaking of this payment of $1,050.00, the appellant said [T. R. 131]: "Well, he offered me a settlement which was fair." In fact the appellant's activities in driving his car [T. R. 110, 121], in voluntarily leaving the hospital [T. R. 123], and his desire to return to work [T. R. 126, 127], all indicated that he was not suffering from any severe flare up of the symptoms of any degenerative disc of long standing.

Dr. Soto-Hall evaluates this flare up as follows [T. R. 239]:

> "A. Well, the fact he was able to carry on for several months, if that is true—I don't know it to be true—if a man is able to continue with regular normal work for several months, I have granted he could have as a result of the accident a flare up. Evaluating the flare up, the amount to me, these factors must be considered. First, we know he must have discomfort before, from an examination of his spinal films. Two, from the fact that he went back to work, I would say that his flare up wasn't too great; but I have granted that he could have a flare up as a result of the accident."

VIII.

The Record Required the Trial Court to Grant a Directed Verdict.

The opinion of the trial court was entirely in accordance with the facts and the law when, in directing the verdict in favor of the appellee, His Honor said [T. R. 264]:

> "In the opinion of the Court, the evidence presented on behalf of the plaintiff, who has submitted his cause, raised no question of fact that requires resolution by the jury. On the contrary, it is my opinion that the evidence discloses that no circumstances presented by the evidence and recognized by the law requires any change or rescission of the agreement that the parties entered into on the 1st day of October, 1945.
>
> "The evidence shows that this agreement was entered into under no compulsion, for a fair consideration, and that both parties had in mind the consideration as that related to the purposes and objects of the agreement.
>
> "Furthermore, no timely rescission or attempted rescission of this agreement is shown by the evidence. The evidence does not disclose any factual matter with respect to any mistake or fraud or undue influence in connection with the execution of this agreement.
>
> "Consequently, there is nothing for the jury to pass upon. The Court finds that there are no circumstances of any kind disclosed by the evidence to justify the rescission of this settlement, which appears to have been a fair and equitable one, and not made under mutual mistake of any kind at the time, or induced by any fraud or undue influence.
>
> "For the reasons that I have stated, the motion for a directed verdict will be granted." [T. R. 265.]

It is the duty of the judge to direct the verdict when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party.

> *Western and A. R. Co. v. Hughes,* 278 U. S. 496-499, 73 L. Ed. 473.

The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case can be properly left to the discretion of the tryer of fact, in this case the jury. * * * When the evidence is such that, without weighing the credibility of the witnesses there can be but one logical conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischances of speculation over legally unfounded claims.

> *Brady v. Southern Railway Company,* 320 U. S. 476-489, 88 L. Ed. 239.

In view of the evidence in this case we are of the opinion that under the law the judgment of the trial court should be affirmed.

Respectfully submitted,

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